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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ROBERT M. BOLZ, N.D. OTTENS, DONALD L. PAUL, PAUL F. GOULD,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

BRIEF OF RESPONDENT, JOSEPH W. EVANS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JOSEPH W. EVANS,

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BRIEF OF RESPONDENT, JOSEPH W. EVANS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Joseph W. Evans, respectfully prays that a writ of certiorari be denied, and that this Court decline to review the judgment of the United States Court of Appeals for the 8th Circuit entered in this case on July 6, 1978.

INTRODUCTION

Respondent, Joseph W. Evans, accepts the Petitioners' statement of jurisdiction; the question presented, the statute involved, and the statement of the case, in this matter.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

CLEAR AND RECENT PRECEDENT INDICATES THAT FILING A CLAIM OF AGE DISCRIMINATION IN A TIMELY FASHION WITH AN APPROPRIATE STATE AGENCY IS NOT A MANDATORY PREREQUISITE TO THE INSTITUTION OF A CIVIL SUIT UNDER THE ADEA.

Of the four circuit courts of appeal to have directly ruled on the question of whether Section 14(b) of the ADEA is a mandatory prerequisite to the institution of a civil suit under ADEA (all within the past six months), only the United States Court of Appeals for the 2nd Circuit has ruled that Section 14(b) of ADEA imposes such a mandatory prerequisite. Interestingly, the 2nd Circuit reached its decision prior to the decisions of the 6th, 8th and 3rd Circuits, and thus did not have the benefit of their holdings. *Gabriele v. Chrysler Corp.*, 573 F.2d 949 (6th Cir. April 7, 1978); *Evans v. Oscar Mayer & Co.*, No. 77-1692 (8th Cir.

July 6, 1978) (*en banc* rehearing denied July 7, 1978); *Holliday v. Ketchum, MacLeod & Grove*, 17 FEP 1175, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*); *Reich v. Dow Badische Co.*, 17 FEP 363, No. 76-7637 (2nd Cir. April 4, 1978).

Further, to the extent that the 2nd Circuit's decision in *Reich* was based on the 3rd Circuit's previous holding in *Goger v. H.K. Porter Co., Inc.*, 492 F.2d 13 (3rd Cir. 1974), it is misplaced, in that *Goger* was expressly overruled by the 3rd Circuit in their unanimous, *en banc* decision in *Holliday v. Ketchum, MacLeod & Grove*, 17 FEP 1175, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*). The Petitioners, on page 4 of their Writ of Certiorari, also cite the case of *Curry v. Continental Airlines*, 513 F.2d 961 (9th Cir. 1975), to support their argument that the 9th Circuit has reached the conclusion that Section 14(b) of ADEA is a mandatory prerequisite to the filing of a federal action under ADEA. Respondent takes exception to this characterization of the holding in *Curry*, and interprets the language in *Curry* to be *dicta*. In any event, the significant reliance in *Curry* on the now overruled *Goger* decision renders the holding in *Curry* suspect. Thus, given the fact that the *Goger* decision has been reversed by the 3rd Circuit, consequently diminishing in importance the holdings which relied heavily on that decision, the clear and recent trend in authority has established that Section 14(b) of the ADEA is not a mandatory prerequisite to the institution of a civil suit under ADEA.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN THIS CASE PROPERLY CONSTRUED SECTION 14(b) OF THE ADEA SO AS NOT TO REQUIRE A FILING WITH AN APPROPRIATE STATE AGENCY AS A MANDATORY PREREQUISITE TO THE INSTITUTION OF A CIVIL SUIT UNDER THE ADEA.

With regard to whether or not Section 14(b) of ADEA is a mandatory prerequisite to the filing of a civil action in Federal Court, the Court below held:

> ". . . We now hold that if an individual complaining about alleged discrimination against him in employment on account of his age in fact files a complaint with a state fair employment practice agency like the Iowa Civil Rights Commission, he must observe the waiting period prescribed by §633(b). We do not think, however, that an individual is required to file a complaint with a state agency before coming into federal court, assuming that he complies with the basic waiting period prescribed by §626(d). In our opinion, such an individual has the option of proceeding first before the state agency and then in the federal court or proceeding initially in the federal court without prior resort to the state agency." *Evans v. Oscar Mayer & Co.*, 117 FEP 1175, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*).

In *Gabriele v. Chrysler Corp.*, 573 F.2d 949, 955 (6th Cir. April 7, 1978), the United States Court of Appeals for the 6th Circuit decided the identical question decided the previous day in *Evans*, and held that:

> "We determine that 29 U.S.C. §633(b) does not require prior resort to an available state agency as a prerequisite to an ADEA suit in federal court. Rather, it gives an aggrieved person the option of pursuing state remedies."

The holdings in *Evans* and *Gabriele* were followed by the United States Court of Appeals for the 3rd Circuit, when the 3rd Circuit reversed, unanimously, *en banc*, their previous holding in *Goger v. H.K. Porter Co., Inc.*, 492 F.2d 13 (3rd Cir. 1974), and in the case of *Holliday v. Ketchum, MacLeod & Grove*, 17 FEP 1175, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*). Thus, *Evans, Gabriele*, and *Holliday* clearly hold that the filing with an appropriate state agency is optional and not a mandatory prerequisite to a civil suit in Federal Court under the ADEA.

Throughout the entire course of litigation in this case, Oscar Mayer & Company has consistently and unsuccessfully attempted to analogize Section 14(b) of the ADEA to somewhat similar language appearing in Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(c).

The United States Court of Appeals for the 3rd Circuit, following the United States Supreme Court's interpretation of the ADEA in *Lorillard v. Pons*, 434 U.S. 575 (1978), specifically rejected this analogy between the procedures prescribed under the ADEA and Title VII when it held in *Holliday v. Ketchum, MacLeod & Grove*, 17 FEP 1175, 1178, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*):

> "As we have previously noted, the majority opinion in *Goger* reached its conclusion through

an almost exclusive reliance on an analogy between procedures prescribed under Title VII and those applicable under the ADEA. We now know however that such reliance was unwarranted. Rather, procedures are to be imported from the FLSA, a statute which does not require any, let alone prior, resort to state proceedings in order to redress FLSA violations. 29 U.S.C. §§216, 217. The critical premise supporting the majority opinion's reasoning in *Goger* having been undercut by the Supreme Court's interpretation of the ADEA, the *Goger* conclusion that prior state resort is necessary must also fall.

In sum, *Lorillard* compels us to disavow the *Goger* majority's reliance on an analogy to Title VII procedure—a reliance which it now appears was 'misplaced.' 46 LW at 4152, 16 FEP Cases at 888."

Thus, Oscar Mayer & Company's reliance on the analogy between ADEA and Title VII is clearly unwarranted. Further, there are several additional independent grounds supporting the construction given Section 14(b) of the ADEA by the United States Court of Appeals for the 8th Circuit.

First, the very language of the ADEA itself soundly supports the conclusion reached by the United States Court of Appeals for the 8th Circuit that filing a claim of age discrimination in a timely fashion with an appropriate state agency is not a mandatory prerequisite to the institution of a civil suit under ADEA. As the Court stated in *Holliday v. Ketchum, MacLeod & Grove*, 17 FEP 1175, 1179, No. 77-140 (3rd Cir. July 14, 1978) (unanimous *en banc*):

"The language of the ADEA itself strongly supports our conclusion that no initial resort to state age discrimination remedies is required. The statute nowhere explicitly imposes a resort to state proceedings as a precondition to instituting federal suit. The provision most likely to have dealt with this subject—the jurisdictional provision—does not even suggest, let alone require, prior utilization of available state machinery. 29 U.S.C. §§626(c), (d), as amended, 29 U.S.C.A. §§626(c), (d) (supp. 1 June, 1978). Similarly, the FLSA does not require nor intimate that prior resort to state administrative machinery is necessary to enforce its provisions. Id. §§216, 217. Indeed, the FLSA prescribes precisely the opposite procedure: a complainant is afforded a choice of forum to enforce the provisions of the statute. Id. §216(b)."

Secondly, the ADEA cannot "be construed as even impliedly requiring a resort to state remedies. Here, 29 U.S.C. §633 is relevant." *Holliday, supra*, at 1179. In discussing the importance of 29 U.S.C. §633 as evidence of the fact that there is no mandatory state resort requirement, the Court of Appeals for the 6th Circuit held in *Gabriele, supra*, at 953, 954:

> "Moreover, §633(a) has no parallel in Title VII. Title VII also does not require exhaustion of state remedies but only the initiation thereof, *Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F.2d 1028, 1031 n5. (9th Cir. 1970), but Title VII has no provision for superseding state proceedings merely by beginning federal action. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1212 (1971). The ADEA thus exhibits lesser deference to the states than does Title VII and gives us no compulsion to require state action as a prerequisite to an ADEA suit."

Thirdly, Congress itself has recently expressed its views as they bear upon the issue before us. On April 6, 1978, the President signed into law the Age Discrimination in Employment Act Amendments of 1978 (Public Law 95-256). Section 4(b)(1) of the ADEA Amendments amends Section 7(d) of the Act, 29 U.S.C. §626(d), which sets forth the procedural prerequisites to a private action, to provide that merely a "charge" rather than a "notice of intent to sue" be filed with the Secretary of Labor. With regard to that amendment, the "Joint Explanatory Statement of the [House-Senate] Committee Conference on the ADEA Amendments" states (Conf. Rep., H.R. Rep. No. 95-950, 95th Cong., 2d Sess., p. 12 [1978], emphasis added):

> "*Conference agreement*
>
> The House recedes with an amendment retaining the 180-day and 300-day time limitations in section 7(d), but requiring that a 'charge' rather than a 'notice of intent to sue' be filed with the Secretary of Labor within this period. *The 300-day limitation and related State deferral procedures are described in more detail in Senate Report 95-493 at pages 5 to 7. The conferees adopt this discussion in the Senate report.*" (Emphasis supplied.)

The Senate Human Resources Committee Report on the ADEA Amendments (S. Rep. No. 95-493, 95th Cong., 1st Sess. [1977]), referred to in the Joint Explanatory Statement, states in pertinent part (pages 6-7, emphasis added):

> "Section 14(b) of the Act provides that where an act of discrimination occurs in a State which has an age discrimination law and an agency em-

> powered to grant or seek relief from such discriminatory practices, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated. This provision requires that *if the individual chooses to apply first to the State agency* for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to the federal courts for relief under the ADEA. *The provision does not require that the individual go to the State first in every instance.*"

Several courts have properly recognized the distinction. See e.g., *Smith v. Jos. Schlitz Brewing Company*, 419 F. Supp. 770, 774 (D.N.J. 1976); *Vazquez v. Eastern Air Lines*, 405 F. Supp. 1353, 1356 (D.P.R. 1975); *Bertrand v. Orkin Exterminating Company*, 419 F. Supp. 1123, 1126 (N.D. Ill. 1976); *Goger v. H.K. Porter Company*, 492 F.2d 13, 17-18 (C.A. 3, 1974) (Garth, J., concurring).

Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that the failure to do so requires dismissal of the federal action. See *Vaughn v. Chrysler Corp.*, 382 F. Supp. 143 (E.D. Michigan 1974); *Smith v. Crest Communities, Inc.*, 8 FEP Cases 1328 (W.D. Ky. 1974); *Fitzgerald v. New England Tel. & Tel. Co.*, 416 F. Supp. 617 (D. Mass. 1976); see also *Goger v. H.K. Porter Co.*, 492 F.2d 13 (C.A. 3, 1974).

It is the committee's view that *an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual.* However, as Section 14(b) makes clear, *if* the individual does choose to proceed initially under

State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action." (Emphasis supplied.)

With regard to the above Congressional intent, the United States Court of Appeals for the 3rd Circuit commented in *Holliday, supra*, at 1180-81:

"It is a rare and welcome event to discover legislative history so unambiguous. Slightly more problematic however is the impact of a 1978 joint committee report on our interpretation of a 1967 enactment. Certainly the intent of the 1978 amenders of the ADEA cannot be said to represent or reflect the intent of the 1967 Congress: there is no necessary relation back. Yet an interpretation of the ADEA which was feasible, if not preferable, before 1978 has now been officially ratified by the joint congressional committee assigned to study and recommend changes in the statute. We recognize, as did the Supreme Court, that although the views of a subsequent Congress 'provide no controlling basis' for inferring original congressional intent, '[n]onetheless, it is pertinent to note [the views of a subsequent congressional committee] . . . reporting . . . on certain proposed amendments to the Act.' *Haynes v. United States*, 390 U.S. 85, 87-88 n.4 (1968). In *Haynes* the Supreme Court was referring to the House Ways and Means Committee which reported on amendments to the National Firearms Act. *A fortiori* the views of a joint congressional committee are entitled to consideration and weight in our re-examination of the contours of sections 626(d) and 633(b) of the ADEA."

Thus, it is clear that the Congressional intent of the ADEA legislation was to provide an aggrieved individual with the *option* of pursuing state administrative relief if the individual so desired, but that this step was never intended to operate as a procedural bar to a Federal civil suit under the ADEA.

Finally, it is important to consider whether a mandatory state resort requirement read into Section 14(b) of the ADEA would effectuate or frustrate the purposes of the ADEA. It is important to note that this is remedial legislation, designed "to promote employment of older persons based on their ability rather than age", 29 U.S.C. §621(b), and is entitled to a liberal construction. *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 93-94 (8th Cir. 1975); *Skoglund v. Singer Co.*, 403 F. Supp. 797, 801 (D.N.H. 1975); *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911, 914 (N.D. Ga. 1973). The particular need for a "quick dispute resolution is acute in the ADEA context since the very cause of the alleged discrimination, age, grows daily. An older person should be allowed to choose the quicker of the two available remedies and not be forced to first choose the state remedy if that would unduly impede him in the resolution of his grievance." *Gabriele v. Chrysler Corp.*, 573 F.2d 949 (6th Cir. April 7, 1978).

CONCLUSION

For all of the foregoing reasons, Joseph W. Evans respectfully requests that a writ of certiorari be denied and that the judgment and decision of the United States Court of Appeals for the 8th Circuit in this case be allowed to stand.

Respectfully submitted,

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